S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 27, 2010
v	No. 288797 Oakland Circuit Court
KEVIN TRACY FRANK, Defendant-Appellant.	LC No. 2008-220632-FC

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted after a jury trial of armed robbery, MCL 750.529, third-degree fleeing and eluding, MCL 257.602a, unlawfully driving away an automobile (UDAA), MCL 750.413, and assault with a dangerous weapon (felonious assault), MCL 750.82. Defendant was sentenced, as a fourth-offense habitual offender, MCL 769.12, to 20 to 40 years' imprisonment for his armed robbery conviction, five to 20 years' imprisonment for his third-degree fleeing and eluding and UDAA convictions, and four to 15 years' imprisonment for his felonious assault conviction. Defendant appeals as of right. We affirm.

Defendant's first issue on appeal is that he was denied the effective assistance of counsel because trial counsel failed to have him independently evaluated in order to pursue an insanity defense. We disagree.

Whether a defendant has been deprived of the effective assistance of counsel is a mixed question of fact and law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). We review the trial court's factual findings for clear error, but review de novo issues of constitutional law. *Id.* at 484-485. Because defendant did not establish a testimonial record regarding the ineffective assistance of counsel claim, our review is limited to mistakes apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

Effective assistance of counsel is presumed, and the defendant bears the burden of proving otherwise. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). "[A] defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Counsel's performance must be measured against an objective standard of

reasonableness and without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

A defendant is denied the right to the effective assistance of counsel where his attorney fails to investigate and prepare a meritorious insanity defense. *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988). However, the record evidences that defense counsel investigated the defense and determined that it was not a meritorious defense.

To assert an insanity defense, a defendant must show that, as a result of mental illness or mental retardation, as the terms are statutorily defined, he or she "lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a. Defendant must prove this by a preponderance of the evidence. MCL 768.21a(3).

Although the Presentence Investigation Report (PSIR) indicated that defendant has had a long history of crack cocaine and marijuana addiction and suffers from a bipolar disorder and suicidal ideation, there is no evidence in the record that defendant lacked the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. Prior to trial, defendant was examined at the Center for Forensic Psychiatry to determine competency and criminal responsibility and the Center found defendant competent to stand trial. In addition, at sentencing, defendant appeared very competent in articulately expressing his remorse for his action. Based on the Center's findings and defendant's conduct, it was reasonable for trial counsel not to obtain an independent evaluation of defendant and not to pursue an insanity defense. This Court will not substitute its judgment for the judgment of counsel regarding matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Therefore, defendant has not overcome the presumption that counsel provided effective assistance.

Defendant next argues that the prosecution presented insufficient evidence to convict him of armed or felonious assault.[1] We review de novo challenges to the sufficient of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We "view the evidence in the light most favorable to the prosecution and determine if any rational trier of fact would have found that the essential elements of the crime were proven beyond a reasonable doubt." *Id.* (quotation marks and citation omitted).

We first consider defendant's challenge to his armed robbery conviction. Defendant argues that the prosecution failed to present evidence that defendant ever had a dangerous weapon or fashioned anything to look like a weapon. This argument ignores the plain language of MCL 750.529, which was amended in 2004 to provide that "represent[ing] orally or otherwise that he or she is in possession of a dangerous weapon" is enough to show armed robbery.

[1] Although defendant argues in his brief that the trial court erred in denying defendant's motion for directed verdict with regard to felonious assault, he fails to address the issue in the discussion section and, instead, makes a sufficiency of the evidence argument with regard to the armed robbery and felonious assault convictions. We address only defendant's sufficiency of the evidence arguments.

Viewed in the light most favorable to the prosecution, the evidence showed that defendant presented a note to Georgia Naidus that read, "You have ten seconds to place $6,000 in front of me or I'm shooting you." This is a representation that defendant was in possession of a dangerous weapon and, therefore, constitutes sufficient evidence to support his armed robbery conviction.

We similarly find sufficient evidence to support defendant's felonious assault conviction. The elements of felonious assault are: (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. MCL 750.89; *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007). Defendant argues that there was insufficient evidence that he committed an assault with an intent to create the apprehension of a battery.

Defendant stole a car and used the car as weapon by driving it directly at Lieutenant David Clemens who was standing in the middle of the street pointing his gun at defendant. Defendant's action put Clemens in reasonable apprehension that he was going to be battered and, as a result, Clemens moved to his left to get out of the way. The issue is whether defendant intended to injure Clemens or place Clemens in reasonable apprehension of immediate harm, or whether Clemens just happened to be in the middle of the road as defendant made his escape.

Criminal intent may be proven indirectly by inference from the conduct of the accused and surrounding circumstances from which intent logically and reasonably follows. *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992). Clemens testified regarding a video of the incident, which shows defendant moving the car towards Clemens as he turned onto Main Street from Third Street even though there were two lanes of unobstructed traffic. Although defendant did not cross the yellow line, viewed in the light most favorable to the prosecution, a reasonable jury could find that, based on the way defendant drove the car, defendant intended to injure Clemens or place Clemens in reasonable apprehension of injury.

Defendant next argues that the trial court erred in failing to give the jury an instruction on necessarily included lesser offenses of armed robbery such as unarmed robbery. We disagree. Although an instruction on a necessarily included lesser offense is proper if all of the elements of the lesser offense are included in the greater offense and a rational view of the evidence would support the instruction, *People v Hall* (*On Remand*), 256 Mich App 674, 677; 671 NW2d 545 (2003); MCL 768.32, absent a request for a jury instruction from one of the parties, the trial court "has no duty to instruction the jury sua sponte regarding all lesser included offenses." *People v Reese*, 242 Mich App 626, 630 n 2; 619 NW2d 708 (2000). Because defendant failed to request the instruction for unarmed robbery, or any other lesser included offense, the trial court did not err in failing to provide them.[2]

[2] Furthermore, we note that it appears defendant's failure to request the lesser-included offense was a strategic decision based on his trial strategy of arguing that he should have been acquitted of armed robbery because he should have been charged with bank robbery instead. A jury instruction the lesser-included offense may have interfered with defendant's defense that he was incorrectly charged.

Defendant further argues that the trial court erred in sentencing him because the trial court failed to consider mitigating evidence, relied instead on inaccurate information, and imposed sentences that are disproportionate and amount to cruel and unusual punishment. However, defendant does not argue that any of the sentences fall outside of the legislative guidelines. Pursuant to MCL 769.34(10), "a sentence within the guidelines range must be affirmed on appeal unless the trial court erred in scoring the guidelines or relied on inaccurate information." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

Defendant does not challenge the scoring, but does argue that the trial court relied on inaccurate information. Nevertheless, there is no evidence that the trial court relied on inaccurate information in sentencing defendant. Defendant's brief fails to point to a single piece of information that was inaccurate, and merely argues that the trial court should have gotten a rehabilitative assessment of defendant. This is not the same thing as the trial court relying on incorrect information. Furthermore, any sentence within the guidelines is presumptively proportionate and, being proportionate, cannot constitute cruel or unusual punishment. *Id.* Therefore, this Court must affirm defendant's sentences. *Id.*; MCL 769.34(10).

Finally, defendant argues that the trial court erred in refusing to give defendant jail credit for the time he was in jail from when he was arrested until he was convicted. We disagree. Defendant did not object to the failure to give sentence credit at sentencing, making this issue unpreserved. *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005). Unpreserved sentencing errors are reviewed for plain error affecting substantial rights. *People v Callon*, 256 Mich App 312, 332; 662 NW2d 501 (2003).

We find no error. This Court decided this precise issue in *People v Johnson*, 283 Mich App 303, 310; 769 NW2d 905 (2009), and concluded that a parolee who is held on a parole detainer pending proceedings on a new offense is not held because of an inability to pay or the denial of bond and, therefore, is not entitled to credit for time served in jail on the sentence for the new offense. *Id*. Instead, the parolee is entitled to have the jail credit applied exclusively to the sentence from which parole was granted. *Id*. It is undisputed that defendant committed the crimes for which he was convicted while on parole and was picked up and held pursuant to a parole detainer. Therefore, the time served from defendant's arrest until his conviction is credited to the prior conviction for which he was paroled, but not the current convictions.

Affirmed.

/s/ Richard A. Bandstra
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro